Supreme Court, U.S.
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No. 99-270

In the Supreme Court of the United States

MICHAEL T. COLLINS, PETITIONER

v.

MONTGOMERY COUNTY BOARD OF PRISON INSPECTORS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether Section 803(d) of the Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321, codified at 42 U.S.C. 1997e(d) (Supp. III 1997), violates the equal protection component of the Due Process Clause of the Fifth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-14a) is reported at 176 F.3d 679. The opinion of the district court (Pet. App. 15a-30a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 13, 1999. The petition for a writ of certiorari was filed on August 11, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On April 26, 1996, Congress enacted the Prison Litigation Reform Act (PLRA), Pub. L. No. 104-134, 110 Stat. 1321. Among other things, the PLRA was

designed to address the overwhelming number of suits brought by prisoners in recent years. As one Senator explained:

> In 1995, 65,000 prisoner lawsuits were filed in Federal courts alone. To put that in context, 65,000 lawsuits is more than the total number of federal prosecutions initiated in 1995. In other words, prisoners incarcerated in various prisons brought more cases in the Federal courts than all Federal prosecutions last year combined.

142 Cong. Rec. S3703 (daily ed. Apr. 19, 1996) (statement of Sen. Abraham). Furthermore, Congress found that the number of prisoner lawsuits was increasing at an alarming rate; that prisoner cases constituted a large percentage of the federal civil docket; and that the vast majority of prisoner suits were without merit, inasmuch as they were dismissed without any relief being awarded. See, *e.g.*, 141 Cong. Rec. S14,413 (daily ed. Sept. 27, 1995) (statement of Sen. Dole); 141 Cong. Rec. S14,418 (daily ed. Sept. 27, 1995) (statement of Sen. Hatch); 141 Cong. Rec. S14,418 (daily ed. Sept. 27, 1995) (statement of Sen. Kyl).

Congress further noted that prisoners do not face the same disincentives to filing frivolous and marginal civil cases as other potential litigants. See, *e.g.*, 141 Cong. Rec. S14,413 (daily ed. Sept. 27, 1995) (statement of Sen. Dole); 141 Cong. Rec. S14,418 (daily ed. Sept. 27, 1995) (statement of Sen. Kyl); 142 Cong. Rec. S3703, S3704 (daily ed. Apr. 19, 1996) (statement of Sen. Abraham).

> Unlike other prospective litigants who seek poor person status, prisoners have all the necessities of life supplied, including the materials required to bring their lawsuits. For a prisoner who qualifies

> for poor person status, there is no cost to bring a suit and, therefore, no incentive to limit suits to cases that have some chance of success.

141 Cong. Rec. S7526 (daily ed. May 25, 1995) (statement of Sen. Kyl). Indeed, Congress found that, unlike other potential litigants, indigent prisoners have positive incentives to sue, regardless of the merit of their claims. Because prisoners have time on their hands, and because "a courtroom is certainly a more hospitable place to spend an afternoon than a prison cell," litigation has become a "recreational activity for long-term residents of our prisons." 141 Cong. Rec. S14,418 (daily ed. Sept. 27, 1995) (statement of Sen. Kyl).

Confronted with those facts, Congress enacted the PLRA "with the principal purpose of deterring frivolous prisoner litigation by instituting economic costs for prisoners wishing to file civil claims." *Hernandez* v. *Kalinowski*, 146 F.3d 196, 200 (3d Cir. 1998) (quoting *Lyon* v. *Krol*, 127 F.3d 763, 764 (8th Cir. 1997)). The PLRA requires indigent prisoners, unlike non-incarcerated indigents, to pay filing fees in certain circumstances. See 28 U.S.C. 1915 (Supp. III 1997). See also *Nicholas* v. *Tucker*, 114 F.3d 17 (2d Cir. 1997) (upholding filing fee requirements of 28 U.S.C. 1915), cert. denied, 118 S. Ct. 1812 (1998); *Roller* v. *Gunn*, 107 F.3d 227 (4th Cir.) (same), cert. denied, 522 U.S. 874 (1997); *Hampton* v. *Hobbs*, 106 F.3d 1281 (6th Cir. 1997) (same). The Act also limits recoveries for purely mental or emotional distress. See 42 U.S.C. 1997e(e) (Supp. III 1997). See also *Zehner* v. *Trigg*, 133 F.3d 459 (7th Cir. 1997) (upholding limitation).

Of particular relevance here, the PLRA limits the attorney's fee awards that prisoners can recover from defendants under 42 U.S.C. 1988 (1994 & Supp. III

1997). In particular, Section 803(d) of the PLRA, as codified at 42 U.S.C. 1997e(d) (Supp. III 1997), provides in pertinent part:

> (d) Attorney's fees
>
> (1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under of this title, such fees shall not be awarded, except to the extent that—
>
> * * * * *
>
> (2) Whenever a monetary judgment is awarded * * * , a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.
>
> (3) No award of attorney's fees * * * shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of title 18, for payment of court-appointed counsel.

42 U.S.C. 1997e(d)(1), (2)-(3) (Supp. III 1997) (footnote omitted).[1] Thus, under the PLRA, prisoners are

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[1] 18 U.S.C. 3006A, a part of the Criminal Justice Act of 1964, as amended, directs each district court to set up a system for "furnishing representation for any person financially unable to obtain adequate representation" in connection with criminal charges. 18 U.S.C. 3006A(a). It also provides that attorneys so appointed be compensated at a rate not exceeding $60 per hour for time expended in court or before a United States magistrate and $40 per hour for time reasonably expended out of court, unless the

required to contribute up to 25% of their judgments to payment of attorney's fees; the total amount of fees for which defendants may be held liable under 42 U.S.C. 1988 is capped at 150% of the judgment; and the hourly rate used in calculating attorney's fee awards cannot exceed 150% of the statutory rate for court-appointed federal criminal defense counsel.

2. Petitioner was a prisoner confined at the State Correctional Institute at Camp Hill, Pennsylvania, when he was transferred to the Montgomery County Correctional Facility for court appearances. Pet. App. 16a. On July 27, 1995, petitioner filed a *pro se* complaint under 42 U.S.C. 1983 against 23 Montgomery County prison officials alleging that, while he was in the defendants' custody, prison guards used excessive force against him and repeatedly set a police dog upon him, in violation of the First, Eighth, and Fourteenth Amendments. Pet. App. 16a. After the district court appointed counsel for petitioner, he amended the complaint twice, reducing the defendants to nine prison officials, and adding the Montgomery County Board of Prisons as a defendant. *Ibid.* On April 26, 1996, the PLRA was enacted. *Id.* at 17a.

On December 16, 1996, after trial, the jury returned a verdict in favor of petitioner, but only against two named defendants. Pet. App. 16a. The jury awarded petitioner $15,000 in compensatory damages and $5000 in punitive damages; petitioner did not, however, prevail on his claims against the Montgomery County Board of Prisons. *Id.* at 16a-17a. Petitioner thus

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Judicial Conference determines that a higher rate not in excess of $75 per hour is justified for a circuit or for a particular district within a circuit. 18 U.S.C. 3006A(d).

prevailed on only one of his three claims against two of the ten defendants. *Ibid.*

Petitioner then sought an award of $80,122.75 in attorney's fees pursuant to 42 U.S.C. 1988. He argued that, because he initiated this action before the enactment of the PLRA, the PLRA's attorney's fees provisions were not applicable to his case. Pet. App. 6a, 18a. Because the defendants conceded that the Act did not apply to fees for legal services rendered before April 26, 1996 (the effective date of the PLRA), the district court addressed only the applicability of the PLRA to legal work done after that date. *Ibid.*

Applying *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), the district court rejected petitioner's argument that the PLRA's attorney's fees provisions were not intended to apply to cases pending on the date of enactment. In particular, the district court held that applying the fees provisions to work done after the PLRA's effective date did not have an "impermissible retroactive effect." Pet. App. 24a.

Petitioner also challenged the constitutionality of the PLRA's attorney's fees provisions. Pet. App. 6a. The United States intervened to defend the constitutionality of the Act, *ibid.*, and the district court rejected the constitutional challenge. Petitioner, the court held, had failed to show that the statute burdened a fundamental right, *id.* at 24a-26a, and had also failed to show that the legislation did not bear a rational relationship to a legitimate governmental purpose. *Id.* at 27a-28a. Accordingly, the district court upheld the statute. *Id.* at 15a.

Consistent with those rulings, the district court awarded petitioner $7789.75 in attorney's fees for services rendered before April 26, 1996, without reference to the fee limitations in the Act. Pet. App. 6a. In

addition, using the maximum hourly rate set by the Act, 42 U.S.C. 1997e(d)(3) (Supp. III 1997), the district court set $30,025.50 as the gross figure for services rendered after April 26, 1996. Pet. App. 14a. The district court then reduced that fee award to 150% of the judgment awarded, or $30,000, as required by 42 U.S.C. 1997e(d)(2) (Supp. III 1997). Pet. App. 14a. Finally, the district court ruled that, pursuant to 42 U.S.C. 1997e(d)(2) (Supp. III 1997), petitioner should pay 2.5%, or $750, of the attorney's fees out of his judgment award, and that defendants must pay the remaining 97.5%, or $29,250. Pet. App. 6a.

3. The court of appeals, sitting en banc, affirmed the judgment of the district court in part and reversed in part. First, the court of appeals affirmed the district court's holding that neither the PLRA provision that limits attorney's fees to 150% of the judgment award, 42 U.S.C. 1997e(d)(2) (Supp. III 1997), nor the provision that limits the hourly rate, 42 U.S.C. 1997e(d)(3) (Supp. III 1997), has an impermissible retroactive effect when applied in connection with services performed after the effective date of the Act. Pet. App. 12a-13a. The court of appeals held, however, that requiring petitioner to use a portion of his judgment to pay a portion of the attorney's fees award, 42 U.S.C. 1997e(d)(2), would be retroactive. Pet. App. 12a. The court of appeals therefore remanded to the district court with directions to enter a judgment that the defendants be responsible for the entire $30,000 attorney's fee. *Id.* at 14a.

The court of appeals then turned to petitioner's constitutional claims. With respect to petitioner's equal protection challenge to the PLRA provision limiting attorney's fees to 150% of the judgment award, 42 U.S.C. 1997e(d)(2) (Supp. III 1997), the court of appeals affirmed the decision upholding the fee award limit by

an equally divided court and without analysis. Pet. App. 13a-14a. The court of appeals further concluded that, in light of its decision upholding the 150%-of-judgment fee award limit, petitioner's challenge to the maximum hourly rate for fee awards was moot. The 150% cap, the court of appeals pointed out, would bar recovery of more than the $30,000 actually awarded, even if the hourly rate cap were invalidated. *Ibid.*

ARGUMENT

Petitioner claims that Section 803(d) of the Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321-72, codified at 42 U.S.C. 1997e(d)(2) (Supp. III 1997), which limits attorney's fee awards in cases brought by prisoners to 150% of the judgment award, violates the equal protection component of the Due Process Clause of the Fifth Amendment. The court of appeals' decision, however, does not analyze that claim or make any law regarding it. It does not conflict with the decision of any other court of appeals. And petitioner's challenge to the PLRA is, in any event, without merit. Accordingly, further review is unwarranted.

1. Petitioner does not contend that the court of appeals' decision creates a conflict among the circuits, and it does not. Although the court of appeals' decision below affirmed the district court's decision, it neither analyzed the constitutionality of the PLRA's 150%-of-judgment fee award limit, nor announced any law respecting it. Instead, the court of appeals merely stated that, because it was evenly divided, the judgment of the district court would be affirmed. Pet. App. 13a-14a. When a court of appeals affirms because it is equally divided, the decision does not bind later panels and is not entitled to any precedential weight. See *Ashe* v. *Styles*, 39 F.3d 80, 86 n.4 (4th Cir. 1994) (quoting

Arkansas Writers' Project, Inc. v. *Ragland*, 481 U.S. 221 (1987)); *Lacy* v. *General Fin. Corp.*, 651 F.2d 1026, 1028 (5th Cir. 1981); *HealthSouth Rehab. Hosp.* v. *American Nat'l Red Cross*, 101 F.3d 1005, 1011 (4th Cir. 1996), cert. denied, 520 U.S. 1264 (1997).

Moreover, even the district court's decision, affirmed by the court of appeals, creates no conflict, because it is consistent with the only court of appeals decision that has addressed that issue. In *Madrid* v. *Gomez*, 190 F.3d 990 (1999), the Ninth Circuit upheld the PLRA's 150%-of-judgment fee award limit as rationally related to a legitimate government interest. Congress, the court of appeals held, could rationally have believed that the provision would curtail marginal prisoner suits and "minimize the costs—which are borne by taxpayers—associated with those suits." 190 F.3d at 996. Rejecting the claim that the PLRA's distinction between prisoners and non-incarcerated persons is irrational, the court further held that it was "conceivable that, because of significant potential gains and low opportunity costs, prisoners generally file a disproportionate number of frivolous suits as compared to the population as a whole." *Ibid.* The district court in this case upheld the 150%-of-judgment fee award limit on virtually identical grounds. See Pet. App. 26a-28a.[2]

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[2] Petitioner also appears to suggest that, because the court of appeals considered this case en banc, it must be an appropriate candidate for review by this Court. See Pet. 6. The fact that a case may meet the criteria for en banc consideration by a court of appeals under Federal Rule of Appellate Procedure 35, however, does not necessarily mean that it meets the criteria for review by this Court. To the contrary, while courts of appeals properly use the en banc procedure to maintain decisional uniformity within the circuit, this Court is primarily concerned with decisional uniformity among the circuits. See *Wisniewski* v. *United States*, 353 U.S.

2. Petitioner's equal protection challenge to the PLRA's 150%-of-judgment fee award limit is also without merit. Petitioner does not dispute that the fee award limit is subject only to rational basis scrutiny. See Pet. 26a; *Madrid*, 190 F.3d at 996. Petitioner instead argues that the fee limit fails the rational basis test, *i.e.*, he contends that the limit is not rationally related to any conceivable legitimate governmental purpose. Pet. 8-13. Petitioner, however, overlooks the broad contours of what constitutes a "rational relation" for purposes of equal protection analysis. As this Court has explained:

> [A] classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity. * * * Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. * * * Instead, a classification 'must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification' * * * and '[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it,' * * * whether or not the basis has a foundation in the record. Finally, courts are compelled under

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901, 902 (1957). See also Sup. Ct. R. 10. Likewise, the fact that a case involves an issue of "exceptional importance" within the meaning of Federal Rule of Appellate Procedure 35(a) from the perspective of the court of appeals does not necessarily mean that the issue constitutes an "important question" that "should be[] settled by this Court" within the meaning of Supreme Court Rule 10(c).

> rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it 'is not made with mathematical nicety or because in practice it results in some inequality.'

Heller v. *Doe*, 509 U.S. 312, 319-321 (1993). Because petitioner cannot "negative every conceivable basis which might support" the PLRA's 150%-of-judgment fee award limit, 42 U.S.C. 1997e(d)(2) (Supp. III 1997), that provision must be upheld.

a. Petitioner first argues that Congress enacted the fee award limit with the apparent purpose of curtailing frivolous litigation, and counters that limiting fee awards for successful plaintiffs cannot rationally be expected to achieve that end. Pet. 9-10. In particular, petitioner argues that the 150%-of-judgment limit on fee awards will have no impact on frivolous cases because fee awards are only contemplated where the prisoner prevails, that is where the suit turns out not to have been frivolous. *Ibid.* But petitioner ignores the fact that the prospect of a large fee award can encourage frivolous suits as well as meritorious ones, because the person who contemplates filing a suit may not accurately perceive that it is frivolous. So long as the plaintiff perceives *any* prospect of success at all, he is subject to the principle that an increase in the potential recovery increases the incentive to bring the lawsuit, notwithstanding a low prospect of success.[3]

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[3] In economic terms, the expected value of a lawsuit is the prospective recovery multiplied by the probability of success, less anticipated costs. Consequently, when the potential recovery increases, so too does the expected value of the suit—even if the overall probability of success is otherwise low.

Moreover, Congress could have rationally concluded that the PLRA lessens the incentive for prisoners to pursue actions predicated on trivial harms. In particular, because the PLRA caps fee awards at 150% of the judgment, it makes suits predicated on *de minimis* injuries (in which the expected monetary recovery is low) less attractive, and suits involving more serious injuries (and that thus might yield a larger recovery) relatively more attractive. Congress regularly adopts measures to discourage trivial claims, for example, by making federal jurisdiction depend on a minimum amount in controversy. See, *e.g.*, 28 U.S.C. 1332 ($50,000 amount-in-controversy requirement for diversity jurisdiction); 42 U.S.C. 1395ff(b)(2) ($1000 amount-in-controversy requirement for review of Medicare benefit determinations).

Finally, the 150%-of-judgment fee cap is rationally related to preventing windfall fee awards and to conserving public resources. By capping fee awards at a set, numerical multiple of the actual judgment, the PLRA cabins judicial discretion and thereby reduces the likelihood of disproportionate fee payments. Cf. *Farrar* v. *Hobby*, 506 U.S. 103, 114 (1992) (affirming refusal to award large attorney's fees for nominal judgment). Moreover, by reducing the size of the fee awards that must be paid from the public fisc,[4] and by discouraging the filing of some cases that otherwise would have to be defended and adjudicated at public expense, the fee award limits of the PLRA promote the

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[4] Although attorney's fee awards generally run against individual defendants and not against the State, it is common knowledge that the States and other governmental units—in order to attract qualified employees—indemnify their employees.

cause of fiscal integrity—or so Congress could rationally have concluded.[5]

b. Petitioner alternatively claims that Congress's decision to apply that cap only to prisoners, but not to non-incarcerated plaintiffs, is irrational. Pet. 11-13. But Congress's differential treatment of incarcerated and non-incarcerated litigants is rationally related to differences between the members of those two classes. Simply put, prisoners have much greater incentives to bring marginal or trivial actions than do non-incarcerated persons.

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[5] Petitioner also seems to argue that the 150%-of-judgment fee award limit is irrational because it affects the attorney and not the prisoner. Pet. 10-11. In particular, petitioner argues that a lawyer's sense of professionalism, *ibid.*, and this Court's decisions limiting fees for technical victories, *id.* at 11 n.8, should ordinarily prevent lawyers from accepting more marginal suits. But nothing in the Constitution requires Congress (or the courts) to accept petitioner's speculation that professionalism and this Court's fee rules by themselves deter lawyers from pursuing trivial and marginal suits and produce a socially-desirable quantity of litigation. And it is in any event not true that the PLRA affects only lawyers. Where the PLRA lessens the financial incentives for taking a marginal case, the prisoner may have to consider offering the lawyer an additional incentive—by committing his own resources, the resources of his family, or a greater amount of the potential recovery. See 42 U.S.C. 1997e(d)(4) (Supp. III 1997) (prisoner may "enter[] into an agreement to pay an attorney's fee in an amount greater than the amount authorized under this subsection, if the fee is paid by the individual rather than by the defendant."). It is surely rational to recognize that if prisoners have to bear some of the costs of litigation, they will have more of an incentive to limit the number of suits they bring. Cf. *Collier* v. *Tatum*, 722 F.2d 653, 655 (11th Cir. 1983) (imposition of partial fee requires prisoners to ask same question that faces any potential civil litigant: "[I]s the merit of the claim worth the cost of pursuing it?").

As Congress expressly found, prisoners have substantially more free time than do non-prisoners and are provided with food, housing, paper, postage, and legal assistance by the government. *Carson* v. *Johnson*, 112 F.3d 818, 822 (5th Cir. 1997). See also *Wilson* v. *Yaklich*, 148 F.3d 596, 604 (6th Cir. 1998), cert. denied, 119 S. Ct. 1028 (1999); *Roller* v. *Gunn*, 107 F.3d 227, 234 (4th Cir.), cert. denied, 522 U.S. 874 (1997); *Mitchell* v. *Farcass*, 112 F.3d 1483, 1488 (11th Cir. 1997). In addition, unlike non-incarcerated litigants, prisoners do not necessarily view the need to devote time to the litigation—attending depositions, preparing to testify, and actually appearing in court—as a cost or disincentive to suit. To the contrary, many may view travel to and from and time at legal proceedings as a partial release from the quotidien circumstances of confinement. See 141 Cong. Rec. S14,418 (daily ed. Sept. 27, 1995) (statement of Sen. Kyl) ("a courtroom is certainly a more hospitable place to spend an afternoon than a prison cell."). And finally, prisoners receive intangible rewards from litigation that are rarely relevant to non-prisoners. For example, the mere initiation of a lawsuit by a prisoner has the potential for creating an *in terrorem* effect on the members of the prison staff.

As a result, Congress could reasonably have concluded that limiting fee awards in prisoner cases was necessary to equalize the litigation incentives of prisoners and non-prisoners. For example, even if lawyers were willing to pursue cases involving *de minimis* injuries on behalf of non-incarcerated persons (because of the prospect of full fee awards under Section 1988), it is rational to expect that such claims would be rare nonetheless. To the non-incarcerated potential plaintiff, the small potential financial recovery is not worth the large personal investment of time and energy—time

and energy that must be diverted from other activities —required to pursue the case. Prisoners, in contrast, are not deterred from bringing trivial suits by the prospect of having to spend time on them. To the contrary, as explained above, they have time on their hands and may view any time away from prison—including time spent attending legal proceedings—as an affirmative benefit. Congress therefore could rationally have concluded that it was appropriate to decrease the incentives to litigate trivial claims for prisoners but not for others. And the PLRA's 150%-of-judgment rule has precisely that effect—or so Congress could have rationally concluded. See p. 12, *supra*. See also note 5, *supra* (explaining how lessening the extent of fee-shifting may cause prisoner litigants to consider the costs of litigation).

Of course, the fit between Congress's goals and the means Congress chose to achieve them may be imperfect. But "courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends." *Heller*, 509 U.S. at 321. Similarly, it makes no difference whether or not the PLRA's 150%-of-judgment limit on fee awards is certain or even likely to meet the conceivable purposes discussed above. Rather, the only question is whether it is plausible to believe that it will. *Id.* at 326. As this Court has explained, a statute must be upheld "if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale seems tenuous." *Romer* v. *Evans*, 517 U.S. 620, 632 (1996). Because the PLRA's 150%-of-judgment limit on fee-shifting easily

meets the requirement of minimal rationality, the district court properly upheld it.[6]

3. Petitioner's further claim, that there is "widespread uncertainty * * * concerning the proper application of rational basis review," Pet. 14, is without merit. Petitioner argues that the decision below is infected by "confusion in the lower courts," Pet. 17, related to the status of Section 1983 plaintiffs who are prisoners, as opposed to those who are not. Pet. 16. Contrary to petitioner's assertion, the many courts of appeals that have addressed equal protection attacks on the various provisions of the PLRA have all instantly

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[6] Petitioner's reliance (Pet. 13) on *Rinaldi* v. *Yeager*, 384 U.S. 305 (1966), is misplaced. In *Rinaldi*, this Court invalidated, on equal protection grounds, a statute that required incarcerated indigents who filed unsuccessful direct appeals of their convictions to pay for the trial transcript, but did not impose that burden on unsuccessful criminal appellants who were not incarcerated. Before deciding *Rinaldi*, this Court had decided, in *Griffin* v. *Illinois*, 351 U.S. 12 (1956), that due process requires the State to provide an indigent criminal appellant with a transcript of the trial, free of charge, where the State also provides a right to appeal. See *Rinaldi*, 384 U.S. at 306. Because the challenged statutory classification there thus had the potential of "imping[ing] on" a "right[] protected by the Constitution," *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985)—*i.e.*, it undermined the indigent's due process right to a free copy of the trial transcript—the Court in *Rinaldi* may well have applied a higher level of scrutiny than that used in ordinary rational basis cases. See *Rinaldi*, 384 U.S. at 310-311 (noting the relationship between the equal protection challenge and the due process right). See also *id.* at 311 (Harlan, J., dissenting) (explaining why the statute would survive ordinary equal protection analysis). Here, there is no due process requirement that Congress subsidize prisoner's rights litigation through a fee-shifting statute. As a result, the sort of heightened scrutiny the Court seems to have applied in *Rinaldi* is inapplicable here.

recognized the "proper application of rational basis review," Pet. 17, and uniformly applied it in exactly the manner employed by the district court below. See, *e.g.*, *Madrid*, 190 F.3d 990 (9th Cir. 1999); *Wilson* v. *Yaklich*, 148 F.3d 596 (6th Cir. 1998), cert. denied, 119 S. Ct. 1028 (1999); *Rivera* v. *Allin*, 144 F.3d 719 (11th Cir.), cert. dismissed, 119 S. Ct. 27 (1998); *Zehner* v. *Trigg*, 133 F.3d 459 (7th Cir. 1997); *Inmates of Suffolk County Jail* v. *Rouse*, 129 F.3d 649 (1st Cir. 1997), cert. denied, 118 S. Ct. 2366 (1998); *Gavin* v. *Branstad*, 122 F.3d 1081 (8th Cir. 1997), cert. denied, 118 S. Ct. 2374 (1998); *Nicholas* v. *Tucker*, 114 F.3d 17 (2d Cir. 1997), cert. denied, 118 S. Ct. 1812 (1998); *Roller* v. *Gunn*, 107 F.3d 227 (4th Cir.), cert. denied, 522 U.S. 874 (1997).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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